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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 582

BERYL H. WEINER, Petitioner,

vs.

FULTON COUNTY AND
LEWIS R. SLATON, Solicitor
General of Fulton County, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, BERYL H. WEINER, files this his petition for writ of certiorari to review the judgment of the Supreme Court of Georgia entered in the above case on June 23, 1966, denying Petitioner's Motion for Reconsideration of his Petition for a writ of certiorari to the Court of Appeals of Georgia's Judgment denying his Motion for Rehearing of the Court of Appeals Judgment dated February 11, 1966. The remittitur of the Court of Appeals having been stayed, this petition is for writ of

certiorari to the Court of Appeals, rather than to the Supreme Court, of the State of Georgia.

OPINIONS BELOW

The Supreme Court of the State of Georgia rendered no opinion in its denial of petitioner's motion for reconsideration.

The opinion of the Court of Appeals of the State of Georgia rendered on February 11, 1966, is reported at 113 Ga. App. 343, 148 S.E. 2nd 143. This is the only opinion rendered in this case and a copy thereof is appended hereto as Appendix "A" and made a part of this petition.

JURISDICTION

The date of the final judgment sought to be reviewed and the date of its entry are the 23rd of June, 1966. A copy of petitioner's motion for reconsideration and judgment denying same dated June 23, 1966 is appended hereto marked Appendix "B" and made a part hereof.

Since no opinion was rendered with said judgment, the effect of same is to make the opinion attached as Appendix "A" the final judgment on the merits, from which relief is desired. Remittitur on said opinion has been stayed pending the outcome of this petition as substantiated by Appendix "C" hereto.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the court below is United States Code, Title 28, Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

A. Does the United States Supreme Court have a right or a duty to correct the procedures established by a State to meet the constitutional standards set by that Court to insure full and adequate legal representation of indigent criminal defendants, when the State's procedures not only do not achieve the desired results, but in themselves violate other individual constitutional rights?

B. May a State meet the standards of Due Process and Equal Protection of the Laws for indigent defendants as established by the United States Supreme Court in a manner which denies Due Process and Equal Protection of the Laws to the attorneys who are appointed or provided to represent them?

(1) Does an attorney have a constitutional right to reasonable compensation for services rendered pursuant to a state court order directing him to represent an indigent?

(2) Does an attorney have a constitutional right to be reimbursed for his out of pocket expenses reasonably and necessarily incurred in representing an indigent pursuant to a state court order directing him to do so?

C. Is the spirit of the Doctrine of *Stare Decisis* defeated when that doctrine is itself used as a vehicle to deny Due Process and Equal Protection of the Laws to an attorney who meets the increased professional obligations imposed upon him by court decisions which themselves create new precedents which result from a recognition of changed sociological conditions?

D. Whether petitioner's Fourteenth Amendment rights were violated by the

(1) failure of the State of Georgia to afford a fair and uniform procedure for the purpose of appointing counsel to represent indigent defendants;

(2) application of an unfair procedure (appointing petitioner to represent three indigents when other members of the bar were seldom or never appointed);

(3) failure of the State of Georgia to compensate petitioner under the doctrine of eminent domain?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. CONST. AMEND. V

U. S. CONST. AMEND. XIV

GA. CONST. Art. I, Section II, Par. I § 2-301

"In cases of necessity, private ways may be granted upon just compensation being first paid by the applicant. Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid."

STATEMENT OF THE CASE

The basic facts of this particular case are by no means unique, but are widely prevalent throughout the nation. Petitioner Weiner, an attorney, was assigned by a court of competent jurisdiction to represent an indigent de-

fendant, Charlie Brown, in a non-capital criminal case, without compensation for either his services or out of pocket expenses. Petitioner Weiner ultimately did represent Charlie Brown in the said case and was successful in obtaining an acquittal for his "client." In doing so, he expended a considerable amount of his time, effort and expertise, as well as his own money and the use of his personal equipment and employees. Therefore, his representation of Charlie Brown resulted in a substantial personal loss to Petitioner Weiner.

The facts which are somewhat unique in this case are that Petitioner Weiner objected to the conscription of his services and other property without adequate compensation, and filed suit to obtain reasonable compensation. In so doing, he raised at the first instance, in his pleadings, the following federal questions:

(1) Violation of the Fifth Amendment of the Constitution of the United States, by taking private property for a public use without first compensation. (R. 4; para. 13 of petition.)

(The trial court sustained a general demurrer and dismissed petitioner's petition. R. 33.)

The Court of Appeals of the State of Georgia, in an opinion which stands unreviewed, held that there was a taking as alleged:

> "Thus there is a public necessity and a public purpose; there is a demand by the sovereign and compliance by the citizen, and there is in all practical effect a taking of the property of that citizen, or, better stated, of a limited class of citizens, forcing them 'alone to bear public burdens which, in all fairness and justice, should be borne by the public

as a whole.' Armstrong v. U. S., supra, P. 49," (R. 50, 51.)

And yet it held that such a taking was not compensable inasmuch as the instant case was controlled by the 1873 case of *Elam* v. *Johnson,* 48 Ga. 348, which so held (R. 53) in spite of the following statement at page 350 of the *Elam* case:

> "Our constitutional provision, that a prisoner shall have 'the privilege and benefit of counsel' is appealed to. Does this mean that the public shall *furnish* him with counsel? We think not."

(2) Violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (in substance), through a discriminatory imposition of an undue and unequal burden upon petitioner individually as a member of the class of attorneys burdened as a class with the duty of representing indigent defendants without just compensation. (R. 7, 8; para. 22 and 23 of petition.)

(The Court of Appeals of the State of Georgia did not answer this question. R. 41-59.)

There is no doubt that petitioner raised in substance the federal nature of the unconstitutionality of burdening the legal profession as a whole with the public duty to defend indigent defendants, in view of the changed sociological conditions of the nation and the impact upon the legal profession of recent United States Supreme Court decisions increasing (or enforcing) the requirements for such representation, in Grounds III, IV, and V of his Motion for Rehearing (R. 68-77), which clearly show the national scope of the problem. It may fairly be said also that petitioner raised the ques-

tion at the first instance in paragraphs 14 through 27 of his pleadings (R. 5-9), although its national importance was neither raised nor required to be raised therein.

(The Court of Appeals of the State of Georgia answered this question in the same manner as it answered question (1) above.)

(A) A concise and succinct statement of the facts can be more readily understood by review of the statement of facts of the Court of Appeals opinion in Appendix "A" herein.

Petitioner's Motion for Rehearing on the opinion of the Court of Appeals was denied on March 16, 1966. (R. 82.)

Petitioner's application of writ of certiorari to the Court of Appeals was denied by the Supreme Court of Georgia on June 9, 1966. (R. 85.)

Petitioner's Motion for Reconsideration of his application for certiorari was denied on June 23, 1966. Appendix "B."

ARGUMENT FOR GRANTING THE WRIT

This case is an ideal vehicle for this Court to use to answer questions which its own decisions have raised. Questions which are of nationwide importance in their scope, and fundamental to the freedoms guaranteed by our Constitution which this Court is constituted to preserve through the mechanism of judicial interpretation.

In landmark cases from *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964) through *Miranda* v. *Arizona*, 383 U.S. ____ 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), this Court has served notice upon

the several States that indigent criminal defendants are constitutionally entitled to *full* and *adequate* legal representation throughout the judicial process, which must be *fair* and *impartial*. These required standards of full representation, fairness and impartiality have been defined to a considerable degree by decisions already rendered by this Court, and will in all probability be further refined by pending decisions; *e. g., Sims* v. *Georgia,* 383 U.S. ____, 86 S. Ct. 1953 (1966).

The standards of *adequate* representation have been less well defined. *Powell* v. *Alabama,* 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); *Avery* v. *Alabama,* 308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940); *Hawk* v. *Olson,* 326 U.S. 271, 66 S. Ct. 116, 90 L. Ed. 61 (1945); *Wade* v. *Mayo,* 334 U.S. 672, 68 S. Ct. 1270, 92 L. Ed. 1647 (1948) and others, answer some of the questions pertaining to adequate representation, but leave others unanswered. They do show that adequate representation is a constitutional requirement.

The method by which each State satisfies the constitutional standards as set forth above has been left for the determination of the individual states. As a result, there exists today a great disimilarity among the States as to the procedures utilized, and an obvious lack of uniformity in achieving results.

That this is true is shown by the bulk of literature and detailed studies concerned with the problem which establish conclusively that the States and the Bar are still struggling with the problems of how to achieve both *full* and *adequate* legal representation for the indigent. See, *e. g.,* Silverstein, *Defense of the Poor,* published in 1965 and consisting of a National Report (Vol. I) and

State Reports (Vols. II and III), which is a survey conducted under the auspices of The American Bar Foundation. This survey illustrates the following points:

(1) The increasing number of indigents requiring legal representation represent an undue burden upon the legal profession. There are an estimated 300,000 felony cases in the nation each year, in which half the defendants are indigent. In addition, there are estimated to be some 5,000,000 misdemeanor cases annually. Vol. I, pp. 7, 9, 123, 148.

(2) Some States have made an honest effort to formulate procedures designed to provide full representation and to spread the burden evenly among members of the Bar. (*e. g.*, New Jersey.) Vol. I, pp. 15-61.

(3) Some States have no real system, but merely assign attorneys from among those who happen to be present in Court or as each judge may determine. (*e. g.*, Georgia.) Vol. I, pp. 15-61; Vols. II, III.

(4) A majority of States use some form of assigned counsel system and provide little, if any, compensation to the attorney, and dissatisfaction for this reason is widespread. Vol. I, pp. 16-33.

(5) No system included in the survey is completely satisfactory. Vol. I, pp. 147-153.

(6) The most frequent recommendation for improvement of all systems is that attorneys representing the indigent be *adequately* compensated. Vol. I, pp. 31-33.

In the instant case Petitioner contends, and shows, that the problem of full representation is intimately related to that of adequate representation. That this contention

is sound is borne out by the recent case of *State* v. *Rush*, 87 N. J. S. 49, 217 A. 2d 441 (1966). The State of New Jersey had had for years what was probably one of the best systems for meeting the need for indigent representation and spreading the burden equally over *all* members of the Bar. But the cited decision recognizes that even this system does not work, and faces the fact that in the realities of today's specialized legal world, not every attorney is capable of adequately defending a criminal defendant. And see *Powell* v. *Alabama*, and other cited cases, *supra*, at page 8. The *Rush* case recognizes that this is especially true if the attorney is not paid. Consequently, even though it was not ready to face the constitutional question of whether assignment of counsel without compensation constitutes a taking of compensable property, the Supreme Court of New Jersey courageously found a means to provide compensation for appointed attorneys. It obviously took this action to achieve the results demanded by this Court, when it recognized that other efforts were unsuccessful.

Is compensation of the appointed attorney the only way that full and adequate representation can be assured? It may be argued that there is another way, but petitioner contends that this is the one *sure* way. There is no dearth of capable and willing attorneys to represent clients able to pay adequately for their services. Then, can it be denied that if assigned counsel are assured of adequate compensation, indigent defendants would be provided with capable attorneys available, able and willing to represent them? Is not *willing* representation an obviously desirable, if not essential, element of adequate representation? Does this not point out the decision which must inevitably be made by this Court?

The questions presented in this petition offer this Court the opportunity to take either a small or a large step in the direction indicated, as this Court in its discretion deems proper. Petitioner urges that the answer to each question presented is obvious, and more than adequately substantiated by the record in this case.

The record of the present case (indeed, the opinion complained of) clearly shows that the State of Georgia has not achieved the results demanded by this Court. Constitutional questions raised by Petitioner have either been left unanswered, or have been dismissed with inadequate or erroneous consideration, especially under the Constitution of the State of Georgia which is self-implementing or self-executing.

This Court, then, can correct the position of the State of Georgia alone, thereby taking a small step in requiring the other States to follow the lead of New Jersey.

Or this Court can answer the larger question presented by this case, of whether there has been a taking of compensable private property for a public use under the Constitution of the United States. Such a decision would tend to require all States to achieve the results demanded by this Court in a uniform manner. The position taken by the District Court in *Dillon* v. *U. S.*, 230 F. Supp. 487 (1964) is, Petitioner contends, the correct one. And this Court is not bound by the reversal by the Court of Appeals, in *U. S.* v. *Dillon*, 346 F. 2d 633 (1965), *cert. den. Dillon* v. *U. S.*, 383 U. S._____, 86 S. Ct. 550 (1966), not only because it has not considered the question, but also because the question has been rendered moot insofar as federal courts are concerned, in view of the Criminal Justice Act of 1964, Pub. L. 88-455, 78 Stat. 552.

CONCLUSION

It is respectfully submitted by Petitioner that it is necessary that this honorable Court settle the questions presented in this petition. The time for some decision, large or small, is long overdue. The case presented herein is an ideal vehicle for this Court to correct this situation.

WHEREFORE petitioner herein respectfully prays for writ of certiorari to review the judgment of the Supreme Court of Georgia, denying his Motion for Reconsideration to grant certiorari from the judgment of the Court of Appeals of Georgia denying his Motion for Rehearing from its judgment and opinion of February 11, 1966, be granted; that the said judgment of the Court of Appeals of Georgia, left undisturbed by the said judgment of the Supreme Court of Georgia, Court of highest resort in said State of Georgia, be reversed, with costs upon respondent Fulton County.

Respectfully submitted,

BERYL H. WEINER
Pro Se

ROY J. LEITE, JR.
Of Counsel

CERTIFICATE OF SERVICE

I, Beryl H. Weiner, a member of the bar of this Honorable Court, of counsel for petitioner herein, Beryl H. Weiner, hereby certify that a copy of the foregoing petition for certiorari has been furnished to Honorable Lewis R. Slaton, Solicitor General, Fulton County, Georgia at 136 Pryor Street, S. W., Atlanta, Ga. and to Honorable Harold Sheats, County Attorney for Fulton County, Ga., 927 Fulton Federal Building, Atlanta, Georgia by United States Mail, with first class postage prepaid to said above stated counsel at their said respective post office addresses, in accordance with rules 21 and 33 of this Court.

This ..... day of September, 1966.

BERYL H. WEINER

Counsel for Petitioner

APPENDIX "A"

41661. WEINER v. FULTON COUNTY, et al.
41662. BROWN v. THE STATE.

ARGUED JANUARY 5, 1966—DECIDED FEBRUARY 11, 1966—REHEARING DENIED MARCH 16, 1966—CERT. APPLIED FOR.

Appointment of counsel for indigent defendant. Fulton Superior Court. Before Judge Dyer.

Charlie Brown, an indigent, was indicted in the Superior Court of Fulton County for assault with intent to murder, and a judge of that court appointed a Fulton County attorney, Beryl Weiner, as defense counsel. Weiner filed for Brown a plea in abatement alleging that he was entitled to proper representation by an attorney able to devote sufficient time and to incur and pay necessary expenses in the defense of his case; that an attorney depending on the use of his time and knowledge for his own subsistence is not capable of offering such assistance and that "no longer can the legal profession and in particular the appointed counsel in this case bear the burden of the cost and expense of the now recognized organic obligation of the State of Georgia and the United States in connection with the administration of cirminal law to furnish and supply legal representation for this defendant as an indigent"; that the preparation and trial of this case can consume a considerable period of time and neither counsel nor the defendant has means to finance the case; that this violates the constitutional mandate that protection to person and property is a paramount duty of government and shall be impartial and complete. The prayer was that he be appointed counsel "within the modern meaning and construction of the Constitutions of the United States and of Geor-

gia," that provisions be made for reasonable compensation to his attorney, and that in lieu thereof he be discharged. This plea was stricken on general demurrer. Meanwhile, Weiner filed an action for declaratory judgment alleging similar facts, and contending that the public can no longer justly demand of attorneys as a class gratuitous services any more than of any other class; that the right of a lawyer to remuneration for legal services rendered is as absolute as that of a merchant for his stock of goods; that a legal requirement that attorneys render services gratuitously in effect imposes a special tax upon a single class, and that such act on the part of a judge of the superior court amounts to a taking of property for public purposes without just and adequate compensation being first paid. This petition also was dismissed on general demurrer. The appeal was directed to the Supreme Court, which has transferred it to this court. *Beryl H. Weiner, Roy J. Leite, Jr.*, for appellant (Case No. 41661).

Harold Sheats, John Tye Ferguson, for appellee.

Beryl H. Weiner, for appellant (Case No. 41662).

Lewis R. Slaton, Solicitor General, J. Walter LcCraw, for appellee.

DEEN, Judge. 1. The right to follow a profession, which of course includes the right to be compensated for services rendered, is a property right. *Muse* v. *Connell,* 62 Ga. App. 296, 303 (8 S.E. 2d 100); *Weatherby* v. *Pittman,* 24 Ga. App. 452 (101 S.E. 131). Specifically, the right to practice law has been held to be a property right within the meaning of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States. *Schware* v. *Board*

of Bar Examiners, 353 U.S. 232 (77 S.C. 752, 1 L. E2d); *Konigsberg* v. *State Bar of California,* 353 U.S. 252 (77 S.C. 722, 1 L. E2d 810). From this it follows that an attorney from whom services are demanded and by whom they are given has a property right in his fee for those services, which may be set by contract, or, if not, should be based on their just and reasonable value. In *United States* v. *Dillon,* 346 F. 2d 633, it was pointed out that a court might issue a valid order compelling a lawyer to represent an indigent. "Our courts have uniformly adopted the practice of assigning counsel to represent indigent criminals in all cases when they were unable to employ counsel to represent them." *Delk* v. *State,* 99 Ga. 667 (26 S.E. 752). "The right of a person accused of a felony to the aid of counsel at all critical stages of criminal proceedings, before trial, and to prosecute an appeal provided by State law, is fundamental and must be protected by the State. . . . It is not inconceivable that the idea embodied in our Constitutions, that every defendant shall stand equal before the law, might be held to require, and would certainly permit, that a criminal defendant be furnished assistance to procure evidence reasonably obtainable for his defense, including when needed an examination by a competent and disinterested expert to give testimony," etc. *Roach* v. *State,* 111 Ga. App. 114, 116 (140 S.E. 2d 919). It has never been thought that in such a case services of experts or others necessary to the production of such evidence could be commandeered, or that they could be forced to give of their time and means for the benefit of the indigent defendant without recompense. "It is clear that the law does not contemplate a person who is not a party to the case and who has no interest therein shall be com-

pelled by any process to expend his time and money in travel, for the purpose of giving testimony or evidence of others, without being compensated for such time and expense. Indeed, to thus take one's time and expense of travel without compenating therefor would constitute taking of property without due process, and when taken by the State or its agency would be for public use without paying therefor, in violation of provisions of the State Constitution." *Dickerson* v. *Mangham,* 194 Ga. 466, 471 (22 S.E. 2d 88). The right of the sovereign in the property of the citizen is hedged by two fundamental safeguards—the taking must be for a public purpose, and it must be attended by just and adequate compensation. Art. I, Sec. III, Par. I, Constitution of Georgia (*Code Ann.* § 2-301). This includes *every species of property* in which the individual has a right of ownership, whether real or personal, corporeal or incorporeal. *Bowers* v. *Fulton County,* 221 Ga. 731 (146 S.E. 2d 884). The incidental expenses of the attorney in this case as well as the value of his time unquestionably constitute a property right within the meaning of *Bowers,* (see also Armstrong v. U.S., 364 U.S. 40 (80 S.C. 1563, 4 L. E.2d 1554)), nor can there be any question but that the purpose is a public purpose. The proper functioning of the judicial system is an integral part of government; the mandate of *Gideon* v. *Wainwright,* 372 U.S. 335 (83 S.C. 792; 9 L. E.2d 799; *Escobedo* v. *Illinois,* 378 U.S. 478 (84 S.C. 1758, 12 L. E.2d 977), and other cases making applicable to the various states the mandate of the Sixth Amendment of our Bill of Rights that every accused in a criminal prosecution has the right to the assistance of counsel for his defense at every critical stage of the case as an essential component of due process in a trial in a

state court compels every agency of government concerned with the operation of the courts to acknowledge the necessity for and implement the means by which this necessary public purpose must be accomplished. The provisions of our own Constitution make the same demand. "While Georgia has no statute requiring the appointment of counsel for an accused unable to employ his own counsel, this court has construed the constitutional provision that every person charged with an offense shall have the privilege and benefit of counsel to mean that, if said accused is not financially able to employ counsel and desires the court to appoint one to represent him, the court must do so, and failure to do so violates his constitutional right to benefit of counsel." *Bibb County* v. *Hancock*, 211 Ga. 429, 436 (86 S.E. 2d 511). There is thus a public necessity and a public purpose; there is a demand by the sovereign and compliance by the citizen, and there is in all practical effect a taking of the property of that citizen, or, better stated, of a limited class of citizens, forcing them "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *U. S.*, supra, p. 49.

2. In spite of these facts, the matter has been considered by the following State and Federal appellate courts and a decision reached that no compensable taking has resulted. U. S. v. Dillon, 346 F. 2d 633, reversing Dillon v. U. S. 230 F. Supp. 487; *California:* Lamont v. Solano County, 49 Cal. 158 (1874); Rowe v. Yuba County, 17 Cal. 62 (1860, Field, Jr.); *Illinois:* Vise v. County of Hamilton, 19 I.. 78 (1857); Johnson v. Whiteside County, 110 Ill. 22 (1884); *Kansas:* Case v. Board of Commissioners of Shawnee County, 4 Kan. 511 (1868);

Louisiana: State v. Simmons, 43 La. Ann. 991 (10 S. 382 (1891); *Michigan:* Bacon v. County of Wayne, 1 Mich. 461 (1850); *Mississippi:* Dismukes v. Board of Supervisors, 58 Miss. 612 (1881); *Missouri:* Kelly v. Andrew County, 43 Mo. 338 (1869); *Montana:* Johnston v. Lewis & Clarke County, 2 Mont. 159 (1874); *Nevada:* Washoe County v. Humboldt County, 14 Nev. 123, 128 (1879); *New Jersey:* State v. Rush, 87 N. J. Super 49 (207 A2d 724) (1965); *New York:* Whedon v. Board of Supervisors, 192 App. Div. 705 (183 N.Y.S. 438) (3d Dept. 1920); Ransom v. Board of Supervisors, 78 N.Y. 622 (1879); *Pennsylvania:* Wayne County v. Waller, 90 Pa. 99 (1879); *Tennessee:* House v. Whitis, 64 Tenn. (5 Baxt.) 690, 692 (1875); *United States:* Nabb v. U.S., 1 Ct. Cl. 173 (1863); *Utah:* Parde v. Salt Lake County, 39 Utah 482 (118 P. 122, 36 LRA (NS) 377) (1911); Ruckenbrod v. Millins, 102 Utah 548 (133 P2d 325, 144 ALR 839) (1943).

Code § 9-601 provides: "It is the duty of attorneys at law . . . (6) Never to reject, for a consideration personal to themselves, the cause of the defenseless or oppressed." Indubitably, this case must be controlled by the interpretation placed on this statute by the Supreme Court of Georgia in *Elam* v. *Johnson,* 48 Ga. 348, 350: "This, too, is an old common law duty, and has been not only the admitted *obligation* but the pride and glory of the profession from time immemorial. The law recognizes the profession and the office. As it confers privileges, it also imposes duties. One of these is that he will never reject the cause of the defenseless, and that when the presiding Judge of a Court (at which he is in attendance)—the head of his profession for the time—presents to his notice a case coming within the sphere of his obli-

gation, he will, in good faith as a man and as a lawyer, come to his aid. If he fail, he fails in his *professional* obligations." Dillon, too, hinged in part on the notion that there is no compensable taking when the attorney "performs an obligation imposed upon him by the ancient traditions of his profession and as an officer assisting the courts in the administration of justice."

We incline to the proposition that lawyers undertake certain professional obligations over and above those demanded of some of the other professions, among them being never to reject, for a consideration personal to themselves, the cause of the defenseless. We also incline to believe that a lawyer, except in unusual circumstances, has no right and will make no effort to refuse a case which he is requested to take by a judge of the court before whom he regularly appears, and that such request is tantamount to a demand. While, therefore, the amount of compensation for the work he does may be shaded by the first of these considerations, compliance which not only deprives him of a considerable portion of his working time but leaves him financially in worse condition through enforced expeditures of personal funds may, under the second, amount to confiscation. To this extent, under prevailing conditions which result in ever increasing demands for uncompensated service, we are fully cognizant that an undue burden is placed on the legal profession as a matter of custom, and that this burden is itself borne unequally by members of the profession in practice; that the glory of service dims in inverse proportion to the demands made upon the time of an individual attorney, and that the very able young attorney who has presented this issue so squarely and forthrightly speaks not for himself but in the name of justice

for all members of his profession and ours. These cases were originally appealed to the Supreme Court and by that court transferred to the Court of Appeals, thus eliminating from consideration any constitutional question. It may be that the matter is one for legislative rather than judicial determination, since a number of other questions are involved which it is unnecessary to decide here, among them the question of whether a county is suable in such a cause of action in any event. The matter is one of utmost importance to the proper functioning of government, and we know as citizens, if we cannot take judicial notice as a court, that the present session of the legislature is giving earnest attention to possible methods of meeting due process standards without undue hardship on the profession. The problem is vital in view of the geometrically increasing velocity of the necessary demands on the time and work product of practicing lawyers, and it is with regret that the court finds it not within its own jurisdiction to offer a solution.

The court did not err in dismissing the petitions in both cases.

Judgments affirmed. Nichols, P. J., concurs. Hall, J., concurs specially.

HALL, Judge, concurring specially. While I concur in the judgment under the ruling in *Elam* v. *Johnson,* 48 Ga. 348, 350, I reject Division 1, which is dictum, and much of the dictum in Division 2 for the reason that much of what is said attempts to place the legal profession on the same level as trade unions.

In Division 1, the majority opinion comes to an advisory conclusion that a request by a court that an attorney represent an indigent defendant in a crimiinal case

amounts to a "taking" for public purposes of his property rights. This conclusion is, to the best of my knowledge, not supported by any common law authority in the English speaking world.

"Historically, the practice of law is a profession. It must remain a profession if the purposes of representation in litigation as part of the machinery of justice are to be achieved. A profession is a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because incidentally it may be a means of livelihood. The exigencies of the economic order require most persons to gain a livelihood and the gaining of a livelihood is a purpose to which they are constrained to devote their activities. But while in all walks of life men must bear this in mind, in business and trade it is the primary purpose. In a profession, on the other hand, it is an incidental purpose, pursuit of which is held down by traditions of a chief purpose to which the organized activities of those pursuing the calling are to be directed primarily and by which the individual activities of the practitioner are to be restrained and guided." 5 Pound, Jurisprudence 676, 677 (1959). The legal profession exists primarily for the advancement of justice. "The best service of the professional man is often rendered for no equivalent or for a trifling equivalent and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward. This spirit of public service in which the profession of law is and ought to be exercised is a prerequisite of sound administration of justice according to law." Pound, The Lawyer From Antiquity to Modern Times 10 (1953).

"Representation of indigents is a traditnoal profes-

sional obligation of the bar, which a lawyer undertakes when he becomes a member of the bar. There is thus no 'taking' when a lawyer is required to fulfill that obligation . . . An applicant for admission to the bar may justly be deemed to be aware of the traditions of the profession which he is joining, . . . Thus the lawyer has consented to and assumed this obligation, and when he is called upon to fulfill it he cannot contend that there is a taking." U. S. v. Dillon, 346 F.2d 633, 636, 638 (1965). The Dillon case cites *Elam* v. *Johnson*, 48 Ga. 348, 350 along with a vast number of other authorities.

The solution to the problem lies not in an action of this sort but, in a thorough policy and practical study and evaluation of our assigned counsel system in its entirety, with participation by all interested groups—bench, bar, legislature and the public. Out of such a study should come, hopefully, a system of providing defense for the indigent which will safeguard the rights of all by providing reasonable compensation for those charged with such defense.

APPENDIX "B"

IN THE SUPREME COURT OF GEORGIA

BERYL H. WEINER,
Applicant for Certiorari
vs.
FULTON COUNTY, and
LEWIS R. SLATON, Solicitor
General of Fulton County

CASE NO. 23499

MOTION FOR REHEARING ON DENIAL OF APPLICATION FOR CERTIORARI

Now comes BERYL H. WEINER, and files this his motion for rehearing on his application for certiorari which was denied on June 9, 1966, and respectfully requests and most earnestly urges the Court to review and grant the petition for writ of certiorari.

In making this motion, applicant appeals to this Court to answer questions of vital importance to applicant and to members of his and this Court's profession, which questions were not answered in the denial of his appeal by the Court of Appeals rendered on February 11, 1966, rehearing denied on March 16, 1966. These questions still remain in applicant's petition for certiorari ready and ripe to be answered by this Court.

Applicant has had his property taken without compensation, as recognized in the decision of the Courts below. It does not seem right that the county and governmental authorities can conscript a man's time for public purposes without paying just and adequate compensation therefor.

This Court has recently held in *Deason* v. *DeKalb*

County, Georgia, (Case No. 23337, decided April 7, 1966) that a DeKalb County policeman was entitled to compensation from the county even though said recovery is not authorized by a specific statute.

Somehow applicant has failed to present the case in the proper light to motivate this Court and the two lower courts to grant relief because it is so clear that the constitutional provisions that private property can not be taken for public use until the owner is first paid just and adequate compensation is mandatory, and neither the legislature nor the courts have any right to restrict, evade, or violate it in the slightest degree; and yet, the Court of Appeals has held that the county through the superior court judge thereof has taken applicant's time and expertise, including out of pocket expenses, without payment therefor, and that same may be done because there is no provision or statute providing for compensation although said constitutional provision has been held times without number to be self executing. *Harrison* v. *State Highway Department,* 183 Ga. 290, 293; *Smith* v. *Floyd County,* 85 Ga. 420, 424.

We therefore respectfully urge that this Court reaffirm the great Chief Justice Bleckley in *Oliver* v. *Railroad Company,* 83 Ga. 257, as follows:

> " 'However important and sacred may be the chartered rights of a [corporation], they can not be more so than is the right of the humblest individual to be protected in the enjoyment of his or her property. The right to take private property without the consent of the owner for public use, after making due compensation as required by the Constitution, even under the most favorable circumstances, savors

> of hardship and oppression. Nothing but a public necessity can justify it, and the welfare of the citizen imperatively demands that it shall never be asserted except in strict conformity with the law of the land.' "Nothing can be plainer or more explicit than the terms of our Constitution. 'Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.' "

Is the fact that lawyers' property has been so taken in the past, in spite of the Constitutional mandate, an adequate answer to that mandate?

If it be said that lawyers as a class may be constitutionally so burdened, so long as the burden is borne equally among all members of the class, is this an adequate answer when the Court of Appeals recognizes that ". . . this burden is itself borne unequally by members of the profession in practice . . ." *Weiner v. Fulton County*, 113 Ga. App. 343, at 349.

Is a past violation of due process corrected by "giving earnest attention to possible methods of meeting due process standards" in the future?

Appellant and his brother lawyers are bound never to reject, for a consideration personal to themselves, the cause of the defenseless or oppressed. Nevertheless, said obligations of the lawyer do not relieve the county and the sovereign from its constitutional obligation to pay for this taking.

WHEREFORE, Applicant, movant herein, moves that the Court grant a rehearing on each and every ground of his petition for certiorari, and reverse its ruling and

for such other and further relief as this Court shall deem meet and proper in the premises.

Respectfully submitted,

/s/ ROY J. LEITE, JR.
ROY J. LEITE, JR.

/s/ BERYL H. WEINER
BERYL H. WEINER

I, BERYL H. WEINER, movant herein, do hereby certify that upon careful examination of the opinion of the Court denying certiorari, that the foregoing facts, statutes and decisions cited in said motion have been overlooked and same are controlling authorities and have been erroneously construed or misapplied. This certificate is made and presented in order to comply with Rule 14 D of this Honorable Court.

This 17th day of June, 1966.

/s/ BERYL H. WEINER
In Propria Personam

CERTIFICATE OF SERVICE

I, Beryl H. Weiner, movant herein, hereby certify that a copy of the foregoing motion has been furnished by mail to counsel of record for the defendants in error, Honorable Harold Sheats, John Tye Ferguson, Attorneys for Fulton County and Lewis R. Slaton, Solicitor General of Fulton County, 927 Fulton Federal Building, Atlanta, Georgia.

This 17th day of June, 1966.

/s/ BERYL H. WEINER
In Propria Personam

SUPREME COURT OF GEORGIA

Atlanta, June 23, 1966

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Beryl H. Weiner v. Fulton County, et al.

Upon consideration of the motion for a reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT

OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

September 19, 1966

I hereby certify that the foregoing six pages hereto attached contain a true and complete copy of the motion for a reconsideration filed in Case No. 23499, Beryl H. Weiner v. Fulton County et al., and the order of the Supreme Court denying the said motion — all as appears from the records and files of this office.

Witness my signature and the seal of the said Court hereto affixed the day and year above written.

/s/ HENRY H. COBB
Clerk.

APPENDIX "C"

COURT OF APPEALS
OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

September 19, 1966

41661. B. H. Weiner v. Fulton County, et al.

I hereby certify that the remittitur in the above stated case is being stayed pending an application to the Supreme Court of the United States for the writ of certiorari.

Witness my signature and the seal of said court, hereto affixed, the day and year above written.

/s/ MORGAN THOMAS
Clerk.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 582

BERYL H. WEINER,

Petitioner

vs.

FULTON COUNTY AND LEWIS R. SLATON,
Solicitor-General of Fulton County,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN TYE FERGUSON,
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IN THE

Supreme Court of the United States

October Term, 1966

No. 582

BERYL H. WEINER,

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Solicitor-General of Fulton County,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of Georgia, is reported at 113 Ga. App. 343, 148 S.E. 2d, 143, decided February 11, 1966. No formal report was made of the denial of the application for certiorari to the Supreme Court of Georgia.

JURISDICTION

Jurisdiction is invoked by the petitioner under the provisions of 28 U.S.C.A. § 1257 (3). Jurisdiction is disputed by the respondents on the grounds that there is no substantial Federal question presented for review. Cf. Rule 19 (1) (a), United States Supreme Court.

QUESTIONS PRESENTED

1. Should a decision of a State Appellate Court be reviewed by the United States Supreme Court on a petition for a writ of certiorari, where the sole Federal issue presented to the lower courts involved a claim that rights were deprived by a state contrary to the Fifth Amendment to the Constitution of the United States, and such Amendment does not apply to actions of the respective states?

STATUTES INVOLVED

United States Constitution, Amendment 5

28 U.S.C.A. §1257 (3).

STATEMENT OF CASE

This originally was a suit brought in the Superior Court of Fulton County, Georgia, by Beryl H. Weiner, against Fulton County and Lewis R. Slaton, as Solicitor-General of Fulton County. In substance, the petition alleged that the petitioner was a duly licensed, practicing attorney at law, and that on August 18, 1965, he had been appointed by the Hon. Stonewall Dyer, a Judge of the Superior Court of Fulton County, to represent three indigent defendants, who had been charged with various criminal offenses under the laws of the State of

Georgia. The petition further alleged that this appointment was without compensation, and that he was entitled to just and adequate compensation for his time and services as an attorney, in that the same were compensable property interests within the meaning of the Fifth Amendment of the Constitution of the United States. (Par. 13 of Petition.) The petition further alleged similar provisions of the Constitution of the State of Georgia, and alleged that the appointment of the petitioner without compensation was violative of certain additional provisions of the Georgia Constitution. The petition concluded with prayers that the Court decree that the appointment of the petitioner was a taking and conscription of his time, which was a compensable property interest, within the meaning of the Constitution of the United States and the State of Georgia. The petition also prayed that further proceedings in the criminal cases be enjoined, and that the petitioner be given a judgment against the defendant Fulton County in the amount of $6,000.00.

Following a hearing on the petition, a general demurrer was sustained, and the petition dismissed by the trial court. The plaintiff appealed this dismissal to the Supreme Court of Georgia, which transferred the appeal to the Court of Appeals of Georgia. This latter Court stated that the case was "originally appealed to the Supreme Court and by that Court transferred to the Court of Appeals, thus eliminating from consideration any constitutional question," and held that the trial court did not err in dismissing the petition upon demurrer. Application for certiorari to the Supreme Court of Georgia was filed by the petitioner, and this was denied. Whereupon, the petitioner filed the instant application for certiorari to the Supreme Court of the United States.

ARGUMENT

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED, AS THE ONLY FEDERAL QUESTION PRESENTED TO THE LOWER COURT WAS NOT SUBSTANTIAL, HAVING BEEN DECIDED ADVERSELY TO THE CONTENTIONS OF THE PETITIONER ON NUMEROUS OCCASIONS.

The petitioner, in his argument concerning the reasons for granting the writ, urges that this case is an ideal vehicle for the United States Supreme Court to use to answer questions which its own decisions have raised. However, an examination of the argument shows that the questions which the petitioner is referring to concern the right of an indigent criminal defendant to *compensated* counsel. It should be noted that this is a right to be asserted by the criminal defendant himself, and not by the counsel. Actually, when the instant case commenced, it was a companion case to a criminal case in which this issue was raised, and the decision of the Court of Appeals of Georgia considered both cases as one. However, there is no petition for a writ of certiorari in the criminal case, and, as a practical matter, there is no necessity for one as the criminal defendant was acquitted on his ultimate trial. It would thus appear that the only issues presented by this petition are those raised on behalf of the petitioner himself, i.e., those raised by an attorney for an attorney, not those raised for the indigent criminal defendants.

It is respectfully submitted that the issues raised by the petitioner in the trial court, and in the appellate courts of Georgia, present no substantial Federal issue, and, hence, this is not a proper case to grant a writ of certiorari.

The statutory basis urged for invoking the jurisdiction of this Court is 28 U.S.C.A. §1257 (3), which provides that "final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) by writ of certiorari, . . . where any title, right, privilege or immunity is *specially set up or claimed* under the Constitution, treaties or statutes of . . . the United States." (Emphasis supplied.)

Judicial interpretation of this section has been to the effect that the Federal right asserted must be presented to the lower court for decision or the case is not subject to review by the United States Supreme Court. "It is not enough that there be somewhere hidden in the record, a question which, if raised, could be of a Federal nature (citations omitted). In order to be available in this court, some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or law or treaties of the United States." *Dewey* v. *Des Moines,* 173 U.S. 193, 199, 200; 43 L. Ed. 665, 667 (1899).

It is clear that in order for a right under the Federal Constitution to be "specially set up or claimed" it must be definitely set forth before the lower court for "a claim which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. (Citations omitted.) A point that was never raised cannot be said to have been decided adversely to one who never set it up or in any way alluded to it . . ." *Dewey* v. *Des Moines,* 173 U.S. 193, 199-200; 43 L. Ed. 665, 667 (1899). See also *Central Vermont Rwy. Co.* v. *White, Admx.,* 238 U.S. 507, 59 L. Ed. 1433

(1915); *Bothwell* v. *Buckbee, Mears, Co.*, 275 U.S. 274, 72 L. Ed. 277 (1927); *Northwestern Bell Tel. Co.* v. *Nebraska State Railway Comm.*, 297 U.S. 471, 80 L. Ed. 810 (1936); *Manhattan Life Insurance Company* v. *Cohen*, 234 U.S. 123, 58 L. Ed. 1245 (1914), and *Whitney* v. *California*, 274 U.S. 357, 362, 71 L. Ed. 1095, 1100 (1926).

It is thus apparent that in order to determine what is presented by the instant petition for a writ of certiorari, it is necessary to determine what Federal issues were presented to the lower courts. A careful examination of the petition in the instant case, and other portions of the record, discloses that in only one paragraph of the petition (par. 13) is there any claim made by the petitioner involving Federal Constitutional rights, and this is an allegation of deprivation of right under the Fifth Amendment of the Constitution of the United States. All of the other claims made by the petitioner relate solely to deprivation of rights under the Georgia Constitution. It is particularly noteworthy that nowhere in the petition nor in the decision of the Court of Appeals is any argument made with reference to deprivation of rights under the 14th Amendment to the United States Constitution, and it thus would appear that the effect of this latter Amendment is not presented by the instant petition for certiorari.

With regard to the one Federal Constitutional issue presented, i.e., the rights of the petitioner under the Fifth Amendment to the Constitution of the United States not to have his private property taken for public use without just compensation, it is respectfully submitted that this is a question which has been decided adversely to the contentions of the petitioner on so many

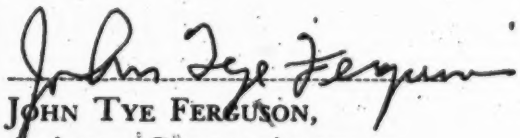
occasions that there is no substantial Federal issue presented. In the case of *Withers* v. *Buckley*, 20 How. 84, 15 L. Ed. 816 (1858), it was specifically held that the mandate of the Fifth Amendment relating to taking of property for public use without just and adequate compensation was a prohibition against the Federal government only, and had no application against action taken by a state. Almost a hundred years after the decision in the *Withers* case, its holding was reaffirmed with reference to other Fifth Amendment rights by Mr. Justice Frankfurter, who stated: "It is plain that the amendment can no more be thought of as restricting action by the states than as restricting the conduct of private citizens." *Knapp* v. *Schweitzer*, 357 U.S. 371, 381, 78 S. Ct. 1302, 2 L. Ed. 2d 1393, 1401 (1958). See also *Martin* v. *Creasy*, 360 U.S. 219, 79 S. Ct. 1034, 3 L. Ed. 2d 1186 (1959), holding that the eminent domain prohibitions of the Fifth Amendment were made applicable to the states only through invocation of the due process clause of the Fourteenth Amendment.

For these reasons it is respectfully submitted that the petitioner having presented no issues involving the Fourteenth Amendment to the United States Constitution to the lower courts, should not now be permitted to assert these rights for the first time in this court. Hence, it is clear that this case does not present a substantial Federal question, and the writ of certiorari should be denied.

CONCLUSION

In concluding, counsel for the respondents would again urge that the writ of certiorari be denied for want of substantial Federal questions. Although there is no disputing the problem presented by forcing attorneys to represent indigent criminal defendants without compensation, this is a problem which should not be resolved by the courts. See *U. S.* v. *Dillon*, 346 F. 2d 633 (C.A. 9th Cir. 1965) *cert. den. Dillon* v. *U. S.* 383 U.S. ——, 86 S. Ct. 550 (1966), and the numerous cases cited therein. Rather, this is a problem which addresses itself to and should be left to the moral conscience of the legislative bodies of the nation, which can and will act in this regard. Cf. Criminal Justice Act of 1964, Public Law Pub. L. 88-455, 78 Stat. 552.

Respectfully submitted,



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Of Counsel:

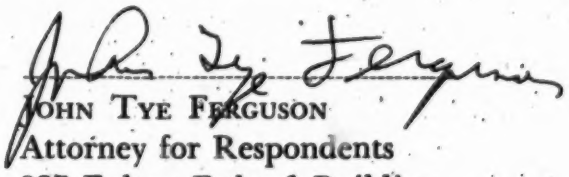
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PROOF OF SERVICE

I, JOHN TYE FERGUSON, Attorney for the Respondents in the foregoing petition for Writ of Certiorari, and a number of the Bar of the Supreme Court of the United States, hereby certify that on the 19 day of October, 1966, I served a copy of the foregoing Brief In Opposition upon the petitioner herein as follows:

By mailing a copy thereof in a duly addressed envelope, with first class postage prepaid to their Attorney of Record as follows:

Beryl H. Weiner
Standard Federal Building
Atlanta, Georgia 30303



JOHN TYE FERGUSON
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